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6 ATTORNEY FOR PLAINTIFF
Camellia Walker
7

8 **IN THE UNITED STATES DISTRICT COURT**
9 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
10 **AT SAN FRANCISCO**
11

12 CAMELLIA WALKER, individually and on
13 behalf of a class of similarly situated
individuals,

14 Plaintiff,

15 v.

16 MOTRICITY, INC., a Delaware corporation,
17 Defendant.
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CASE NO. C-08-03648 MHP

**PLAINTIFF'S NOTICE AND
MOTION TO REMAND;
DECLARATION OF RANDALL A.
SNYDER IN SUPPORT OF
PLAINTIFF'S MOTION TO REMAND**

Date: October 6, 2008
Time: 2:00 p.m.
Judge: Marilyn Hall Patel
No Trial Date Set

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on October 6, 2008, at 2:00 p.m., or as soon thereafter as counsel may be heard before the Honorable Marilyn Hall Patel in Courtroom 15 of the United States District Court for the Northern District of California, located at U.S. Courthouse, 450 Golden Gate Avenue, 18th Floor, San Francisco, California 94102, Plaintiff Camellia Walker will and hereby does move under 28 U.S.C. § 1447(c) for an order remanding this action to the Superior Court of the State of California, County of Alameda, with attorneys' fees and costs awarded to Plaintiff.

Pursuant to the provisions of 28 U.S.C. § 1447(c), Plaintiff moves to have this case remanded to the Superior Court of California, County of Alameda. Defendants' removal of this case to this Court was improper and contrary to well-established law. This Court lacks subject-matter jurisdiction over the case and therefore should remand the case with attorney's fees awarded to Plaintiff.

Defendant shoulders the burden of demonstrating, by a preponderance of the evidence, that removal is proper. As explained in the contemporaneously-filed Memorandum of Points and Authorities in Support of Plaintiff's Motion to Remand, Defendant has failed to sustain that burden. Among other reasons, Defendant has failed to show that the amount in controversy exceeds \$5 million as required for removal under CAFA.

WHEREFORE, Plaintiffs respectfully request this Honorable Court remand this action to the Superior Court of California, County of Alameda, award fees to the Plaintiff incurred in bringing this motion, and award such additional relief as this Court deems necessary and just.

DATED: August 27, 2008

CAMELLIA WALKER

By: /s/ Alan Himmelfarb
One of Ms. Walker's Attorneys

**PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF MOTION TO REMAND**

In its attempt to show that the amount in controversy in this case exceeds \$5 million, Motricity advances a straw man argument that the injunctive relief Plaintiff seeks requires Motricity to develop, or participate in the creation of, an access code system that would cost Motricity \$7,985,430. This is not true. In the complaint, Plaintiff generally requests that the Court “[e]nter judgment for injunctive and/or declaratory relief as is necessary to protect the interests of Plaintiff and the Class.” (See Compl., Prayer for Relief, p. 15, ¶ h). Nowhere does Plaintiff seek to require Motricity to develop an access code system. Rather, Plaintiff alleges that Motricity need only “agree” to process customer access codes given by the wireless carriers. Motricity ignores the actual language of the allegation and argues instead that such injunctive relief requires it to develop, or participate in the creation of, an access code system. Critically, however, by providing an estimate of the costs of developing such a system—something that Plaintiff is not seeking—Motricity has failed to show that the amount in controversy in this case exceeds \$5 million.

Even assuming *arguendo* that Plaintiff is seeking to require Motricity to develop an access code system, Motricity has still failed to show that the amount in controversy exceeds \$5 million because Motricity’s expert overstates the costs of developing such a system and processing customer access codes, and the access code system is not the only way to cease the phenomenon of illegal billing for unauthorized mobile content. As a result, this Court should remand this case to the Superior Court of California, County of Alameda. In support, the Plaintiff states as follows:

BACKGROUND FACTS

This case concerns Motricity’s alleged profiteering from “cramming”—the process by

1 which providers of premium mobile content collect money from cell-phone customers for
2 services the customers never actually ordered, and then remit a percentage of that money to
3 entities known as aggregators and wireless carriers. (Compl. ¶¶ 6-26). Cell phones and other
4 mobile devices have the capacity to display premium mobile content (ringtones, games, stock
5 tips, jokes, daily horoscopes, etc.) (Compl. ¶ 6). Cell phone users purchase such mobile
6 content services on Internet websites, through short code promotions, and by other means.
7 (Compl. ¶ 13).¹

8
9 Mobile content providers charge their customers subscription fees that ultimately
10 appear as line-items on the customers' cell phone bills. (Compl. ¶ 12). To effectuate such
11 purchases, providers of mobile content send a customer's telephone number and charge to a
12 billing aggregator, such as Motricity, who has relationships with the wireless carriers.
13 (Compl. ¶ 12). These aggregators act as middle-men, representing numerous mobile content
14 providers in arriving at agreements that allow such content providers to use the billing and
15 collection mechanisms of the wireless carriers. (Compl. ¶¶ 8, 14). Armed with only the
16 wireless phone number and the charge, the billing aggregator can cause a cryptic line-item to
17 be placed on the customer's wireless telephone bill. (Compl. ¶ 12). Mobile phone customers
18 then pay their wireless carriers directly, who keep a portion of the proceeds before remitting
19 the remainder to the aggregator, who, in turn, retains its share before sending the mobile
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23
24 ¹ For example, Customer A visits a website operated by a mobile content provider that sells
25 ringtones for \$1 each. Customer A enters her wireless telephone number into a field on the
26 website, and the desired ringtone is sent to her wireless device. The mobile content provider
27 then sends Customer A's telephone number and the corresponding charge information to a
28 billing aggregator (a middleman of sorts who has relationships with major wireless carriers
such as AT&T, Sprint and T-Mobile). The aggregator, in turn, instructs Customer A's
wireless carrier to place the charge on Customer A's cell phone bill. Critically, no mechanism
adequately verifies that the person ordering the services is actually Customer A, or someone
authorized to make such purchases on Customer A's behalf.

1 content provider the remaining proceeds. (Compl. ¶¶ 19, 20).

2 Given the absence of adequate verification procedures, a mobile content charge may
3 be wrongfully placed on a cell phone bill. (Compl. ¶ 12, 13). In each case, the absence of
4 adequate verification procedures allows these companies to pocket monies for services
5 customers never actually ordered. (Compl. ¶ 8). Here, the Plaintiff alleges that Motricity
6 caused her to be billed for mobile content services that she never authorized. (Compl. ¶¶ 27-
7 33).

8
9 On July 30, 2008, Motricity filed a "Notice of Removal" arguing that this Court
10 should exercise jurisdiction over this case under CAFA. Plaintiff concedes that Motricity has
11 shown minimal diversity and that the lawsuit concerns over 100 persons. Motricity has failed
12 to demonstrate by a preponderance of the evidence, however, that the amount in controversy
13 in this case exceeds \$5 million. Accordingly, this case should be remanded to the Superior
14 Court of the State of California, County of Alameda.
15

16 ARGUMENT

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18 Federal courts are courts of limited jurisdiction. *Lowdermilk v. U.S. Bank, Nat'l*
19 *Ass'n*, 479 F.3d 994, 999 (9th Cir. 2007) (federal jurisdiction is to be strictly construed)
20 (relying on *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377, 114 S.Ct. 1673, 128
21 L.Ed.2d 391 (1994)). As a result, removal statutes ought to be construed narrowly. *See Gaus*
22 *v. Miles Inc.*, 980 F.2d 564, 566 (9th Cir. 1992) ("Federal jurisdiction must be rejected if there
23 is any doubt as to the right of removal. . .") (citations omitted); *see also Guglielmino v.*
24 *McKee Foods Corp.*, 506 F.3d 696, 700 (7th Cir. 2007) (the "plaintiff is 'master of her
25 complaint' and can plead to avoid federal jurisdiction.") (*citing Lowdermilk*, 479 F.3d at 998-
26 99).
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1 **A. *Motricity Bears the Burden of Proving CAFA Jurisdiction***

2 CAFA provides, in relevant part, that “the district courts shall have original
3 jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of
4 \$5,000,000, exclusive of interest and costs,” where there are at least 100 members of the
5 putative class, and at least one member of the putative class is a citizen of a state different
6 from the defendant. 28 U.S.C. § 1332(d).

7
8 The burden of proving jurisdiction rests with the party seeking removal. *Lowdermilk*,
9 479 F.3d at 997; *see also Abrego Abrego v. The Dow Chemical Co.*, 443 F.3d 676, 685 (9th
10 Cir. 2006) (removing party required to prove burden by preponderance of evidence); *McNutt*
11 *v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936) (“If [the removing
12 defendant’s] allegations of jurisdictional facts are challenged by his adversary in any
13 appropriate manner, he must support them by competent proof”); *Serrano v. 180 Connect,*
14 *Inc.*, 478 F.3d 1018, 2007 WL 601984 (9th Cir. 2007) (the proponent of federal jurisdiction
15 bears the burden of proving jurisdiction).

16
17
18 In determining whether the removing party has met its burden, courts may look to the
19 complaint to see “whether it is ‘facially apparent’ [] that the jurisdictional amount is in
20 controversy;” but if not, “may consider facts in the removal petition, and [] require parties to
21 submit summary-judgment-type evidence. . . .” *Singer v. State Farm Mut. Auto. Ins. Co.*, 116
22 F.3d 373, 377 (9th Cir. 1997) (internal citations omitted). Conclusory allegations are
23 insufficient to support jurisdiction. *Id.*; *Gaus*, 980 F.2d at 567. Evidence a removing party
24 might use to establish federal jurisdiction includes admissions in state court, calculations
25 based on the complaint’s allegations, or introducing affidavits from the defendant’s
26 employees or experts. *Meridian Sec. Ins. Co. v. Sadowski*, 441 F.3d 536, 541-42 (7th Cir.
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28

1 2006).

2 ***B. Plaintiff is Not Seeking to Require Motricity to Develop, or Participate in the***
3 ***Development of, an Access Code System***

4 Motricity shoulders the burden of proving \$5 million at issue by a preponderance of
5 the evidence. This it has failed to do.

6 Motricity's evidence of the amount in controversy rests entirely on its straw man
7 argument that the injunctive relief Plaintiff seeks requires Motricity to develop, design, or
8 participate in the creation of, an "access code" system (e.g., a system in which mobile content
9 providers would be required to produce a customer's access code—given to a wireless
10 customer when an account is opened—any time the content provider attempts to charge a
11 wireless customer's account). As its sole proof, Motricity attaches to its notice of removal the
12 declaration of Paul Bock ("Bock"), Motricity's Director of Engineering. Bock's declaration,
13 however, does not bring Motricity any closer to establishing the amount in controversy. Put
14 simply, Plaintiff is not seeking to compel Motricity to develop an access code system.

15 In her complaint, Plaintiff makes a single reference to an access code system inasmuch
16 as she alleges that if Motricity wanted to put an end to the illegal billing of mobile content,
17 Motricity need only *agree* to process an access code given by the wireless carrier to the cell
18 phone customer. (emphasis added). Bock implicitly concedes that the wireless carriers would
19 develop such a system, but nonetheless, uses the passive voice in paragraph three of his
20 declaration to muddy whom the complaint contemplates should develop the system. (Bock
21 Decl., ¶ 3, "I have reviewed Paragraph 24 of the Complaint. In order to comply with the
22 relief requested therein, Motricity would be forced to effectuate a system whereby a unique
23 "access code" for each customer would be provided.").

24 The complaint makes clear that in such a system, wireless carriers provide new

1 customers with access codes when a new wireless account is opened. Because it is the
 2 wireless carriers that are providing the access codes, it is the wireless carriers that would
 3 necessarily create the system. Aggregators such as Motricity need only *agree* to process the
 4 customer access code before a third party attempts to charge the account for mobile content.
 5 Bock's declaration does not address the far more narrow calculation of the costs of agreeing
 6 to process these access codes (attorneys' fees, time spent executing an agreement, and the
 7 attendant costs of compliance). Hence, by calculating the costs of developing the entire
 8 system, Bock's declaration misses the point and, more importantly, should not be viewed as
 9 evidence of the amount in controversy.
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 11

12 ***C. Bock Overestimates Both the Costs of Developing an Access Code System***
 13 ***and the Costs of Agreeing to Process Customer Access Codes***

14 Assuming *arguendo* that Bock's declaration addresses the costs that Motricity stands
 15 to incur by agreeing to process customer access codes, such costs would be considerably less
 16 than \$5 million, let alone the \$7,985,430 figure advanced by Motricity. (*See* Declaration of
 17 Randall A. Snyder, a true and accurate copy of which is attached as Ex. A).²
 18

19 As explained in the declaration of industry expert Randall A. Snyder, even if Motricity
 20 were to build an access code system from the ground up, it is unlikely that the costs of doing
 21 so would exceed \$5 million. (Snyder Decl. ¶ 6). The reason being that Bock's cost analysis
 22 relies on the flawed assumption that Motricity lacks the necessary software, systems, facilities
 23

24 ² Mr. Snyder is an independent mobile telecommunications technology consultant with 24
 25 years of experience and is an expert in the field of mobile and cellular telecommunications.
 26 He spent seven years developing standards within the American National Standards Institute's
 27 (ANSI) subsidiary organization, the Telecommunications Industry Association (TIA),
 28 providing technical contributions and authoring and editing mobile telecommunications
 proposed standards documents. Most notably, Mr. Snyder co-founded m-Qube, Inc., a
 leading billing and processing company, or "aggregator," in the mobile content industry.
 (Snyder Decl. ¶¶ 1-4)

1 and personnel that would be useful in creating such a system.

2 It is disingenuous, however, for Motricity to claim that it must develop from scratch a
3 system to process customer access codes because its existing systems and software have the
4 capability to process access codes. (Synder Decl. ¶ 6). In fact, Motricity currently markets
5 and sells a variety of software products on their managed software platform that already
6 support many of the components (i.e., SMS, SMPP, WAP, HTTP) in Mr. Bock's line-item
7 cost analysis. (Synder Decl. ¶ 6). Hence, the operational and maintenance costs advanced by
8 Bock are considerably overstated because they do not account for the resources that already
9 exist to support Motricity's products. (Synder Decl. ¶ 6).
10
11

12 In addition, "Bock provides no detailed description, requirements, functional
13 specifications or detailed design solution that is necessary to produce a complete, competent
14 and well thought out costs analysis of a such a solution..." (Synder Decl. ¶ 5). Nor does
15 Bock make any effort to compare in-house development costs with the costs of purchasing
16 licensable software or solutions that perform some or all of the desired functionality. (Synder
17 Decl. ¶ 8). Absent such information, Bock's declaration does not contain a realistic
18 assessment of the costs of developing an access code system or processing access codes.
19 Motricity has failed to sustain its burden of proof.³
20

21 ***D. There Are Other Ways to Stop the Illegal Billing of Mobile Content***

22 A cursory review of the complaint reveals that Walker references the access code
23 system as only one example of how to curb the phenomenon of illegal billing for mobile
24 content. The access code system is by no means the only way to stop cramming.
25

26 Another way that Motricity can put an end to cramming is to follow, or demand that its
27

28 ³ To the extent that the Court finds it necessary, Plaintiff requests leave to conduct limited discovery on this issue.

content providers follow, the Consumer Best Practices (“CBP”) guidelines promulgated by the Mobile Marketing Association (“MMA”), to which Motricity is a member company. (Snyder Decl. ¶ 10). The CBP guidelines provide guidance to content providers, aggregators, and wireless carriers on effective ways to avoid billing for unauthorized mobile content. For example, with respect to offers of “free” mobile content, the CBP guidelines provide:

If there are obligations associated with the term ‘free’, the full commercial offer should be disclosed in the same manner at point of offer as the ‘free’ promotion. The entire offer must be presented in the same place (i.e. banner ad, top of ad, etc.). It is important that if the word FREE is used in promoting the service that it be accompanied by WITH SUBSCRIPTION for premium subscription content, or FREE with transport charges. Free should never be promoted alone and should always have an indication or means of transport.

See <http://www.mmaglobal.com/bestpractices.pdf>. It is hard to imagine how Motricity would spend in excess of \$5 million by requiring that its content providers adhere to guidelines such as these.

Motricity could also engage the services of a third party such as Bango, Inc. (“Bango”), to protect against billing for unauthorized mobile content. (Snyder Decl. ¶ 9). Bango administers the actual sale of the mobile content before redirecting the user to the content provider for transmission of the mobile content.⁴ This method of billing employs many of the safeguards that accompany Internet credit card purchases at a fraction of the costs of creating an access code system. (Snyder Decl. ¶ 9).

E. Motricity’s One Sentence Assertion of Monetary Damages Is Not Evidence of the Amount in Controversy

Lastly, Motricity tersely asserts that “the additional consideration of monetary damages sought by the plaintiff class significantly increases the total amount in controversy—an

⁴ See <http://bango.com/tour/pay/easy.aspx>.

1 amount which far exceeds \$8 million..." (Notice of Removal, ¶ 14). However, to sustain its
 2 burden of proof, Motricity must do more than provide conclusory allegations of the amount in
 3 controversy. *See Singer*, 116 F.3d at 377; *Gaus*, 980 F.2d at 567.

4 CONCLUSION

5
 6 Motricity is simply unable to twist the allegations of the complaint sufficiently to
 7 show in excess of \$5 million in controversy. Walker is not seeking to require Motricity to
 8 develop an access code system and therefore, Motricity's estimate of the costs of developing
 9 such a system is not evidence of the amount in controversy. In the end, Motricity has failed to
 10 sustain its burden of proof.

11
 12 **WHEREFORE**, Plaintiff Camellia Walker, respectfully requests this Honorable Court
 13 (a) grant her motion to remand, (b) remand this case to the Superior Court of the State of
 14 California, County of Alameda, or, in the alternative, reserve its ruling on Plaintiff's motion
 15 to remand and grant Plaintiff leave to conduct limited discovery into the actual cost of
 16 complying with the requested injunctive relief, (c) award Plaintiff attorneys' fees and costs
 17 incurred in connection with bringing this motion, and (d) grant such other and further relief as
 18 this Court deems equitable and just.

20 **CAMELLIA WALKER**

21 By: /s/ Alan Himmelfarb
 22 One of Ms. Walker's Attorneys

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CERTIFICATE OF SERVICE

I, Alan Himmelfarb, an attorney, certify that on August 27, 2008, I served the above and foregoing *Plaintiff's Notice and Motion to Remand and the Declaration of Randall A. Snyder in Support of Plaintiff's Motion to Remand*, by causing true and accurate copies of such paper to be filed and transmitted to the persons shown below via the Court's CM/ECF electronic filing system, on this the 27th day of August, 2008.

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/s/ Alan Himmelfarb

EXHIBIT A

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Telephone: (323) 585-8696

4 Attorney for Plaintiff
Camellia Walker

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8 **IN THE UNITED STATES DISTRICT COURT**
9 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
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11 CAMELLIA WALKER, individually, and on
12 behalf of all others similarly situated,

13 Plaintiff,

14 v.

15 MOTRICITY, INC., a Delaware corporation,

16 Defendant.

Case No. C 08-03648 MHP

DECLARATION OF RANDALL A. SNYDER

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18
19 **DECLARATION OF RANDALL A. SNYDER**

20 I, Randall A. Snyder, hereby declare as follows:

- 21 1. My name is Randall A. Snyder. I am an independent mobile telecommunications
22 technology consultant and reside at 8113 Bay Pines Avenue, Las Vegas, Nevada,
23 89128. I have been retained by the law firm of KamberEdelson, LLC to provide my
24 opinions on issues concerning mobile short message service (SMS) technology,
25 commonly known as mobile text messaging, mobile content distribution technology
26 and the use of these technologies by Motricity, Inc.

27
28 **DECLARATION OF RANDALL A. SNYDER**

- 1 2. I have over 24 years of experience in mobile telecommunications network and system
2 architecture, engineering, design and technology. I consider myself to be an expert in
3 the field of mobile and cellular telecommunications, mobile and cellular networking
4 technology and specifically, short message service and mobile content distribution
5 technologies. A copy of my *curriculum vitae* is attached to this declaration.
- 6 3. I have taught many classes and seminars on mobile telecommunication network
7 technologies and have been a panelist and speaker at numerous conferences at the
8 Institute of Electrical and Electronics Engineers (IEEE), the Personal Communication
9 Society (PCS), and the Cellular Telecommunications and Internet Association (CTIA)
10 as an expert in mobile telecommunication networks. I spent seven years developing
11 standards within the American National Standards Institute's subsidiary organization,
12 the Telecommunications Industry Association (TIA), providing technical
13 contributions and authoring and editing mobile telecommunications proposed
14 standards documents. Most notably, I authored and oversaw the standardization of
15 Interim Standard 93, providing interconnection technology between wireline and
16 mobile networks, which is now a fully accredited national standard of the American
17 National Standards Institute (ANSI). I am the author of the McGraw-Hill books
18 "Mobile Telecommunications Networking with IS-41," and "Wireless
19 Telecommunications Networking with ANSI-41, 2nd edition" published in 1997 and
20 2001, respectively. These books have sold several thousand copies and were required
21 reading for mobile engineers at AT&T Wireless and Motorola for several years. The
22 latter book has also been relied upon and cited numerous times as a reference for
23 various Short Message Service (SMS) patents in the mobile industry, such as Method
24 and Apparatus for Routing Short Messages, US Patent #6308075, Method and
25 System for Wireless Instant Messaging, US Patent # 7058036 and Automatic In-Line
26 Messaging System, US Patent # 6718178. I have been granted several patents myself

1 on mobile networking technology and currently have three additional patent
2 applications filed in the area of Short Message Services and mobile content
3 publication and delivery. I have also authored several articles on mobile
4 telecommunications technology and have been quoted numerous times in industry
5 trade publications. I have consulted and been employed for many mobile
6 telecommunications companies including McCaw Cellular, AirTouch, AT&T
7 Wireless, Lucent, Nokia, Ericsson, Nextwave, MCI, Sprint and other mobile
8 technology vendors and service providers. I was a founder of m-Qube, Inc. (acquired
9 by Verisign, Inc. in 2006), which develops and markets mobile text messaging
10 services. I was also nominated in 2006 for a National Television Arts Emmy Award
11 for Outstanding Achievement in Advanced Media Technology for unique mobile
12 content distribution products I designed while employed at Entriq, Inc. Still more
13 detail as well as details of publications that I have authored or co-authored within at
14 least the past 10 years are provided in my attached *curriculum vitae*.

- 15 4. I have reviewed the original complaint against Motricity, Inc. and the Declaration of
16 Mr. Paul Bock, Director of Engineering for Motricity, Inc. It is my understanding that
17 Mr. Bock has provided a cost analysis for the development, operation and ongoing
18 maintenance costs for a so-called "access code" solution to prevent Motricity's
19 wrongful and unauthorized billing of mobile subscribers.
- 20 5. Mr. Bock has provided a detailed line item cost analysis to implement and deploy an
21 access code solution on behalf of Motricity's content provider customers whereby
22 wrongful and unauthorized charges to mobile subscribers may be prevented. The
23 costs provided are based on a set of individual assumptions that, if changed, would
24 significantly reduce these costs. And, in fact, Mr. Bock provides no detailed
25 description, requirements, functional specifications or detailed design of the solution
26
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1 that is necessary to produce a complete, competent and well thought out cost analysis
2 of such a solution leading to his conclusion of a total cost just under \$8 million.

3 6. Chief among the cost analysis assumptions is that an access code solution needs to be
4 completely implemented and deployed from scratch. The primary characteristic of
5 this assumption is that there exists no software, systems, facilities or personnel at the
6 start of the project. Moreover, the assumption is made that such a solution cannot be
7 integrated into Motricity's existing systems or software and that any existing systems
8 or software that Motricity owns cannot be used for the solution. Motricity, Inc.
9 currently markets and sells a variety of software products on their managed software
10 platform supporting many of the components in Mr. Bock's line-item cost analysis.¹
11 For example the Motricity Gateway and Motricity Messaging products provide the
12 technology to completely support SMS, Premium SMS, SMPP, WAP, HTTP, billing
13 processing and mobile content storefronts.² Furthermore, the cost analysis highlights
14 the operational and maintenance costs for the development and maintenance of an
15 access code solution for which these resources must already exist to support the
16 Motricity Gateway, Messaging and other products. In addition, Motricity's existing
17 products make extensive use of database technology and resources that also must
18 already exist and can be used to mitigate costs.

19 7. Another assumption that is explicitly put forth by Mr. Bock is that the entire project
20 to create, manage and support an access code solution requires additional expensive
21 consultants under contract to implement and develop the solution. These contractors
22 include product managers, architects, software programmers, database administrators,
23

24 ¹ See <http://www.motricity.com/about/keyserve.php>.

25 ² See <http://www.motricity.com/pdf/services/gateway.pdf>;
26 <http://www.motricity.com/pdf/services/messaging.pdf>.

1 project managers and operations personnel at a cost of \$125 per hour. The cost of
2 contractors can vary widely and in my experience these skill sets can be obtained for
3 significantly less, especially when obtained through a competitive bidding process or
4 bundled under a single umbrella contract for the entire project. Also, the number of
5 person-hours required for this personnel for each cost item put forth is highly
6 questionable since without detailed solution descriptions, requirements specifications,
7 functional specifications and design specifications it is not possible to estimate how
8 much labor is required for a particular aspect of a particular software development
9 project.

10 8. If we make the assumption that even in the presence of existing technology, Motricity
11 is forced to implement and deploy an access code solution entirely and completely
12 from scratch, there are many ways to mitigate costs. When confronted with a new
13 software development project, it is typical for software organizations to perform a
14 cost analysis comparing the cost to develop the entire project in-house, using
15 employees or contractors, with the cost of purchasing licensable software or solutions
16 that perform some or all of the desired functionality. This is commonly known as a
17 "buy vs. build" analysis and software organizations that do not perform this analysis
18 would be considered careless. This is because companies that market and sell licensed
19 software solutions can only be profitable if the cost of a particular software solution
20 to their customers is significantly less than the cost for those customers to develop a
21 similar solution themselves.

22 9. There are many companies that market and sell the components highlighted in Mr.
23 Bock's cost analysis. And, in fact, there are many companies that sell complete
24 solutions for all of the components listed by Mr. Bock obviating the need for most in-
25 house development. Complete licensable solutions for the functionality described by
26 Mr. Bock including SMS, Premium SMS, SMPP, WAP, HTTP, billing processing
27

1 and mobile content storefronts are available from companies such as Bango, Volantis,
2 Verisign and mBlox. These partner and vendor solutions cost significantly less than
3 comparable in-house development and some vendors can even provide the entire
4 solution for a fraction of the cost of developing and maintaining them in-house. In
5 many cases, much of the fees for these solutions may even be charged by the vendors
6 on a transaction basis eliminating much of the initial non-recurring engineering costs
7 and capital expenditures.

- 8 10. The implementation and deployment of access code functionality can be a feasible
9 means for preventing wrongful and unauthorized billing of mobile subscribers.
10 However, there are other solutions that may be considered. For example, the Mobile
11 Marketing Association (MMA), an industry trade organization that promulgates best
12 practices and codes of conduct for the delivery of mobile content requires that
13 “subscribers must positively acknowledge the acceptance of a premium charge before
14 premium charges are applied to their account.”³ In fact, Motricity, Inc. is a member
15 of the MMA and played a prominent role in the development of the MMA’s Global
16 Code of Conduct that applies to organizations within the mobile content ecosystem.⁴
- 17 11. There are many ways to implement the MMA’s requirements, the most common of
18 which is requiring subscribers to explicitly confirm reception of mobile content
19 charges before the content is delivered using a text message dialogue. This
20 mechanism is known as “double opt-in” and the functionality is provided by many
21 mobile content delivery companies as well. The double opt-in mechanism is a means
22 to ensure that the subscriber who actually ordered and intended to purchase the
23 content is in fact still the rightful subscriber that desires that content. The double opt-

24
25 ³ See MMA Consumer Best Practices Guidelines Version 3.3, July 9, 2008. ©Mobile
26 Marketing Association, 1670 Broadway, Suite 850, Denver, CO 80202.

27 ⁴ See <http://mmaglobal.com/modules/article/view.article.php/2029>.

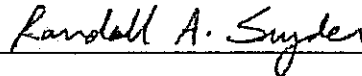
1 in confirmation mechanism is specifically designed to prevent unauthorized billing to
2 subscribers when for some reason it may be discovered that they no longer desire the
3 content or the subscriber is different than the one who originally ordered the content.
4 It is critical to note that, in certain circumstances, for example, content delivered as a
5 recurring subscription service, that a double opt-in confirmation mechanism be
6 provided each time before chargeable content is delivered to ensure that over time the
7 subscriber who originally ordered the content is still the same subscriber and still
8 wishes to pay for the content.

9 12. In summary, it is my opinion that a competent cost analysis cannot be performed on
10 an access code solution to prevent wrongful and unauthorized charges to mobile
11 subscribers in the absence of a detailed description, requirements specifications,
12 functional specifications and detailed designs of the solution. It is also my opinion
13 that Motricity has failed to provide a competent cost analysis since no detailed
14 solution description has been provided for the cost analysis nor have detailed
15 requirement specifications, functional specifications and design specifications been
16 used to perform the cost analysis. Motricity, Inc. actively markets and sells solutions
17 that incorporate many of the components and software functions that seem to be
18 required for an access code solution according to Mr. Bock, thereby obviating the
19 need for them to be developed from scratch. The costs provided for expensive
20 consultants may not be required to implement and develop an access code solution if
21 a competitive bidding process is used or licensed software solutions are employed.
22 And finally, an access code solution may not be required as the true requirement to
23 prevent wrongful and unauthorized mobile content charges is to ensure that the
24 mobile subscriber to be charged has explicitly confirmed an instance of mobile
25 content delivery prior to the charges being applied to the account.

1 13. My opinions in this declaration are based upon extensive experience in the wireless
2 industry, a detailed understanding of mobile content delivery systems, how premium
3 text messaging services operate and a detailed and thorough understanding of the
4 mobile content delivery ecosystem. If called to testify, I could and would testify
5 competently about these opinions.

6 Pursuant to 28 USC § 1746, I declare under penalty of perjury that the foregoing is true and
7 correct.

8 Executed on: August 27, 2008



Randall A. Snyder

1 **IN THE UNITED STATES DISTRICT COURT**
2 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
3 **AT SAN FRANCISCO**

4
5 CAMELLIA WALKER, individually and on
6 behalf of a class of similarly situated
7 individuals,

8 Plaintiff,

9 v.

10 MOTRICITY, INC., a Delaware corporation,
11 Defendant.

CASE NO. C-08-03648 MHP

[PROPOSED] ORDER

12 **[PROPOSED] ORDER**

13 This cause coming before the Court for ruling on Plaintiff Camellia Walker's Motion
14 to Remand this Case to the Superior Court of the State of California, County of Alameda,
15 pursuant to 28 U.S.C. § 1447(c), due notice having been given, and the Court having been
duly advised in the premises,

16 **IT IS HEREBY ORDERED:**

- 17 1. Plaintiff's Motion to Remand this Case to the Superior Court of the State of
18 California, County of Alameda, is hereby granted;
- 19 2. This case is remanded to the Superior Court of the State of California, County
20 of Alameda;
- 21 3. Plaintiff is awarded attorneys' fees and costs incurred in connection with her
22 Motion to Remand.

23 **ENTERED:**

24 Dated: _____, 2008

25
26 _____
27 Judge Marilyn Hall Patel
28